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Torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, submitted in accordance with Assembly resolution 68/156.

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Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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In the present report, the Special Rapporteur addresses the extraterritorial application of the prohibition of torture and other ill-treatment and attendant obligations under international law. He elaborates on States' obligations to respect and ensure the right of all persons to be free from torture and ill-treatment whenever they engage in acts or breach the human rights of individuals outside their borders, and further addresses topics such as extraterritorial complicity in torture, extraordinary rendition, and a range of obligations to combat and prevent torture and other ill-treatment.

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I. Introduction

1. The present report, submitted pursuant to General Assembly resolution 68/156, is the seventeenth submitted to the Assembly by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

2. The Special Rapporteur wishes to draw attention to his most recent report submitted to the Human Rights Council (A/HRC/28/68 and Add.1-4).

II. Activities relating to the mandate

3. The Special Rapporteur conducted a country visit to Georgia from 12 to 19 March 2015.

4. On 23 April 2015, the Special Rapporteur gave expert testimony about the exclusionary rule in international law in the case of *Maldonado v. Chile* at a hearing of the Inter-American Court of Human Rights in Cartagena, Colombia, at the request of the Inter-American Commission on Human Rights.

5. On 5 May 2015, the Special Rapporteur participated in a global webinar on torture of children deprived of liberty organized by the Anti-Torture Initiative.

6. On 12 May 2015, the Special Rapporteur appeared before legislators in the parliament in Brasilia to speak on the autonomy of forensic sciences and laboratories in Brazil.

7. From 10 to 12 June 2015, the Special Rapporteur participated in the twenty-second annual meeting of special rapporteurs/representatives, independent experts and working groups of the special procedures of the Human Rights Council, in Geneva, and held bilateral meetings with members of several permanent missions.

8. On 26 June 2015, the Special Rapporteur participated in events in Washington, D.C., and, by videoconference, in Madrid to commemorate the United Nations International Day in Support of Victims of Torture.

9. On 9 July 2015, the Special Rapporteur held expert consultations on the extraterritorial application of the prohibition of torture and other ill-treatment, the focus of the present report, supported by the Anti-Torture Initiative.

10. The Special Rapporteur conducted a country visit to Brazil from 3 to 14 August 2015.

III. Prohibition of torture and other ill-treatment from an extraterritorial perspective

A. Overview

11. In the present report, the Special Rapporteur addresses the extraterritorial application of the prohibition of torture and other ill-treatment and attendant obligations in international human rights law, in particular the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Human rights norms were initially conceived to regulate not just States' behaviour vis-à-vis

persons present within their territories but also towards any persons under their jurisdiction, a concept that unequivocally covers some extraterritorial acts and situations.[1] In practice, the increasingly transnational nature of State actions entails a need to ensure that States abide by their fundamental human rights obligations when acting beyond, or when their domestic acts cause injury outside, their territorial boundaries.

12. Extraterritorial State acts[2] (or omissions) — whether lawful or unlawful — often have a significant impact on the fundamental rights of individuals outside their borders, thereby implicating States' responsibilities under international human rights law. State actions that produce significant extraterritorial effects merit analysis through the prism of international human rights law. Such actions can include cross-border military operations or use of force (A/68/382 and Corr.1); the occupation of foreign territories; anti-migration and anti-piracy operations; peacekeeping, policing or covert operations in foreign territories; the practice of detaining persons abroad; extraditions, rendition to justice and extraordinary rendition; and the exercise of de facto control or influence over non-State actors operating in foreign territories. All these scenarios can involve the commission or risk of torture or other ill-treatment as defined by the Convention, international humanitarian law, international criminal law or customary international law. Of particular concern are States' attempts to undermine the absolute legal prohibition of torture and other ill-treatment by evading or limiting responsibility for extraterritorial acts or effects by their agents that contravene their fundamental legal obligations; to narrowly interpret treaty jurisdictional provisions; and to dilute well-established obligations to ensure and fulfil positive human rights obligations whenever they exercise control or authority over an area, place, individual(s) or transaction.

13. The Special Rapporteur examines herein States' obligations to respect and ensure the right of all persons to be free from torture and ill-treatment and to comply with attendant legal obligations imposed by customary and applicable treaty law whenever they engage in acts or breach the human rights of individuals outside their borders, and to ensure a broader range of positive obligations when they are in a position to do so extraterritorially. Denying the applicability of extant legal standards to torture or other ill-treatment committed, sponsored, aided or effectively controlled or influenced by States outside their territories can create incentives for States to avoid absolute legal obligations and amount to serious breaches of international law. The Special Rapporteur considers that it is essential to ensure that there is no vacuum of human rights protection that is due to inappropriate and artificial limits on territorial jurisdiction.

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[1] In human rights treaties, the most common formulation refers to State party's "jurisdiction", which is susceptible to multiple interpretations beyond merely the State party's "territory". See, for example, the International Covenant on Civil and Political Rights. The International Court of Justice has categorically rejected the argument that human rights treaties only bind States with regard to their own territory. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70.

[2] Defined as conduct attributable to a State, either of commission or omission, performed outside sovereign borders. This includes acts performed within a State's territory that produces extraterritorial effects. See M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford, Oxford University Press, 2011).

B. Prohibition of torture and other ill-treatment and attendant obligations from an extraterritorial perspective

14. The prohibition against torture and other ill-treatment is codified in most international and regional human rights instruments and is a rule of customary international law and a *jus cogens*, or peremptory, norm of international law applying to all States.[3] The Special Rapporteur recalls that the obligation to respect the human rights of all persons applies whenever States affect the rights of individuals abroad through their acts or omissions.[4] All States parties to the International Covenant on Civil and Political Rights must respect and ensure the rights contained therein to all persons within their power or effective control outside their territories and regardless of how such power or effective control was obtained. This includes "all individuals regardless of nationality or statelessness ... who may [be] subject to the jurisdiction of the State Party".[5] This is because construing State responsibility so as to allow a State to perpetrate on the territory of another State human rights abuses that it could not perpetrate on its own territory would produce unconscionable and absurd results at odds with fundamental legal obligations.[6] The International Court of Justice recognizes that human rights obligations are unequivocally applicable in respect of acts done by States in the exercise of their jurisdiction outside their own territories.[7]

15. Under the existing universal legal regime, a State is bound to respect human rights and refrain from engaging in or contributing to a risk of torture or other ill-treatment every time that it brings a person within its jurisdiction by exercising power, control or authority over territory, persons or transactions outside its borders, regardless of the victims' nationality or the territorial locus of the action, omission or injury in question.[8]

16. There is no presumption against the extraterritorial application of human rights treaties in international law. Where a State exercises power and authority over persons outside its national territory, its obligation to respect the pertinent human rights obligations continues; this presumption can be rebutted only when the nature and content of a particular right or treaty language indicate otherwise.[9] This understanding is consistent with the evolution of human rights regimes and the displacement of the traditional international law emphasis on territorial sovereignty as a precondition for jurisdictional competence with the understanding of obligations *erga omnes partes* and the growth of specialized human rights regimes.[10]

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[3] International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 99.

[4] States are "accountable for violations of rights under the [International Covenant on Civil and Political Rights] which [their] agents commit upon the territory of another State". Human Rights Committee, *López v. Uruguay*, para. 12.3.

[5] Human Rights Committee, general comment No. 31 (2004), para. 10.

[6] See Human Rights Committee, *López v. Uruguay* and *Casariego v. Uruguay*.

[7] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136.

[8] Beth Van Schaack, "The United States' position on the extraterritorial application of human rights obligations: now is the time for change", *International Law Studies*, vol. 90 (2014).

[9] Harold Hongjiu Koh, "Memorandum opinion on the geographic scope of the Convention against Torture and its application in situations of armed conflict", 21 January 2013.

[10] Theodor Meron, "The 'humanization' of public international law", *American Journal of International Law*, vol. 94, No. 2 (April 2000).

Fundamental human rights and freedoms, such as the right to be free from torture and other ill-treatment, are universally recognized, as reflected in the Vienna Declaration and Programme of Action, as "the birthright of all human beings [and] their protection and promotion [as] the first responsibility of Governments".

17. Unlike traditional, that is, prescriptive or enforcement, notions of jurisdiction, jurisdiction clauses in human rights treaties are best understood as referring to the extent of a State's factual authority or control over territory or persons. A State is responsible for violations of human rights when, in respect of the conduct alleged, the victim was brought under the effective control of, or affected by those acting on behalf of, the State. In this vein, the Inter-American Commission on Human Rights explains that findings of State responsibility turn on whether in any given circumstance the State observed the rights of a person subject to its authority and control, rather than the victim's nationality or geographical location. Often, "the exercise of [a State's] jurisdiction over acts with an extraterritorial locus will not only be consistent with, but required" by the relevant norms (*Coard and others v. United States of America*). It is indisputable that no person under the authority and control of a State, regardless of circumstances, "is devoid of legal protection for his or her fundamental and non-derogable human rights".[11]

18. The European Court of Human Rights also recognizes that States are responsible for the physical and mental integrity of persons under their authority, power or control, finding that States' responsibilities "may arise in respect of acts and events [taking place] outside [their] frontiers" and due to the acts of their agents, "whether performed within or outside national boundaries, which produce effects outside their own territory" (*Loizidou v. Turkey*; mutatis mutandis, *M v. Denmark*). Such scenarios recognized by the Court include the "exercise [of] authority and control over individuals killed in the course" of security operations by one State on the territory of another State (*Al-Skeini v. The United Kingdom*); the handover of individuals to the custody of a State's agents abroad (*Ocalan v. Turkey*); the interception and imposition of control over a ship (and persons therein) in international waters (*Jamaa and others v. Italy*); the detention of individuals in prisons operated or controlled by the State party abroad (*Al-Saadoon and Mufdhi v. The United Kingdom*); exercise of control over an area outside national territory as a consequence of military action (*Hassan v. The United Kingdom*); or the exercise of physical control over an individual, including outside formal detention facilities (*Issa and others v. Turkey*). Whenever a State exercises control over an individual extraterritorially through its agents, it must secure the substantive rights and freedoms under the Convention that are relevant to the situation of that individual (*Al-Skeini*).

19. The Special Rapporteur contends that the excessive use of force by State agents extraterritorially, resulting in loss of life or injury that meets the threshold for torture or other ill-treatment but occurs in the absence of direct physical control over an individual in the form of custody or detention, must also qualify as constituting authority and control by States (European Court of Human Rights, *Andreou v. Turkey*). It is imperative that States not be permitted to evade their fundamental obligations on the basis of a spurious distinction based on whether a State exercised direct physical control over an individual before committing the

[11] Inter-American Commission on Human Rights, decision on precautionary measures concerning persons detained by the United States in Guantanamo Bay, Cuba, 12 March 2002.

injurious act. In this context, the Special Rapporteur welcomes the judgement of the Inter-American Court of Human Rights in *Alejandre v. Cuba* finding the State responsible for the shooting down of two civilian aeroplanes flying in international airspace. He likewise welcomes the finding of the European Court in *Jaloud v. The Netherlands* that the State breached its procedural obligations to investigate the killing of Mr. Jaloud and the pronouncement that the shooting of a vehicle passing a checkpoint in Iraq constituted an exercise of jurisdiction "for the purpose of asserting authority and control over persons passing through the checkpoint".

C. Extraterritorial complicity and extraordinary rendition

20. The Special Rapporteur recognizes several potential scenarios of complicity in torture and other ill-treatment with an extraterritorial component. First, a State may acquiesce to an extraterritorial human rights violation by a second State on its territory (European Court of Human Rights, *El-Masri v. The former Yugoslav Republic of Macedonia*). Second, complicity itself can be extraterritorial, as in cases where the individual suffering a violation is located in a territory outside the complicit State's control and under the control of the principal. Examples include the alleged collusion, connivance, presence or participation of Canadian and British intelligence services in the interrogation and mistreatment abroad of Omar Khadr, Maher Arar and Binyam Mohamed.

21. Violations of the prohibition against torture or other ill-treatment — and of preventive obligations — can be committed by perpetration, omission and acts of complicity. Article 4 (1) of the Convention against Torture refers to the individual criminal liability of a person for complicity or participation in torture. The Committee against Torture considers complicity to include acts that amount to instigation, incitement, superior order and instruction, consent, acquiescence and concealment.[12] It is clear that acquiescence (art. 1 of the Convention) by State officials is sufficient for their conduct to be attributed to the State and give rise to State responsibility for torture. Article 4 (1) clearly reflects an obligation on States themselves not to be complicit in torture through the actions of their organs or persons whose acts are attributable to them (A/HRC/13/42).

22. State responsibility also derives from existing customary rules as codified in the draft articles on responsibility of States for internationally wrongful acts, which confirm that no State should aid or assist another State in the commission of an internationally wrongful act (arts. 16-18). In such cases responsibility is incurred if the former State provides aid or assistance to the latter (a) "with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State" (A/56/10 and Corr.1). Examples of assistance triggering State responsibility under article 16 include forms of assistance vital to the practice of extraordinary rendition and secret detention, including unchecked access to ports and military bases and "permissive" authorizations of the North Atlantic Treaty Organization for blanket overflight or landing rights,[13] the provision of intelligence by one State to another with the foreseeable result being the torture or ill-treatment of an individual, and financial

[12] General comment No. 2 (2008).

[13] Hans Born, Ian Leigh and Aidan Wills, eds., *International Intelligence Cooperation and Accountability* (London, Routledge, 2011).

assistance to development projects in which torture was employed in the context of displacement or implementation.[14] States should never recognize as lawful a situation created by a "serious breach" of its obligations under peremptory norms of international law and should cooperate to bring the breach to an end (arts. 40 and 41 of the draft articles). Therefore, if a State were torturing detainees, other States would have a duty to cooperate to bring the violation to an end and would be required not to give any aid or assistance to its continuation (A/67/396; A/HRC/13/42).

23. According to article 4 (1) of the Convention, interpreted in line with international criminal law jurisprudence, "complicity" contains three elements: (a) contribution by way of assistance, encouragement or support; (b) a substantial effect on the perpetration of the crime; and (c) knowledge that the help rendered assists in the perpetration of the crime.[15] Thus, individual responsibility for complicity in torture arises also in situations in which State agents do not themselves directly inflict torture or other ill-treatment but direct or allow others to do so, or acquiesce in it. In addition, orders from superiors or other public authorities cannot be invoked as a justification or excuse. Similarly, draft article 16 requires either the knowledge that the assistance is facilitating the wrongful act, or that there is an intention to do so.

24. The legal prohibition against torture and other ill-treatment would be meaningless if in practice States were able to abuse victims outside their borders with the complicity of other States, while evading responsibility on technical grounds pertaining to the territorial locus of the violations. The issues of extraterritorial complicity are particularly important in view of the extraordinary rendition and secret detention programme conducted by the United States Central Intelligence Agency after 11 September 2001, which saw States collaborate and assist one another in contravention of established international human rights standards by abducting, transferring, extrajudicially detaining and subjecting individuals to torture.[16] The obligation in article 9 of the Convention against Torture mandating that States parties "afford one another the greatest measure of assistance in connection with civil proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings" must be emphasized. This provision requires States to cooperate — in terms of providing evidence and other forms of mutual legal assistance — with criminal and civil legal proceedings involving claims of torture, rather than seek to block, otherwise hinder or ignore those proceedings. The requirement for cooperation in both criminal and civil proceedings is unsurprising, given the widely accepted recognition that a fundamental raison d'être behind the Convention was the establishment of a regime for international cooperation in the criminal prosecution of torturers based on the principle of "universal jurisdiction".[17]

25. The European Court of Human Rights, in *El-Masri*, held that a State was responsible for acts performed by foreign officials on its territory with the "acquiescence or connivance of its authorities", imputing to the former Yugoslav

[14] United Kingdom of Great Britain and Northern Ireland, High Court of Justice of England and Wales, *R. (O) v. Secretary of State for International Development* (2014).

[15] International Tribunal for the Former Yugoslavia, *Prosecutor v. Šainović and others* (2009).

[16] "European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners", 14 February 2007.

[17] United States Senate, Executive Report 101-30, 30 August 1990.

Republic of Macedonia harmful conduct that was "carried out in the presence of [its] officials" and within its jurisdiction". The Court further found that Poland had an obligation to do more than refrain from collaborating with and facilitating the Central Intelligence Agency rendition programme when it knew or ought to have known that detainees would be subject to extraordinary rendition and exposed to a risk of torture or other ill-treatment upon transfer. Even when the Polish authorities did not "know exactly or witness what was happening in the facility", they were required to take measures to ensure that individuals within their jurisdiction were not subjected to mistreatment, including harm administered by private individuals (*Abu Zubaydah v. Poland*). The State should have taken steps to "inquire into whether [the activities of the Agency] were compatible" with the international legal obligations of Poland and indeed acted to prevent the activities in question (*Al-Nashiri v. Poland*).

D. Extraterritorial applicability of the Convention against Torture and the Optional Protocol thereto

26. In its preamble, the Convention against Torture explicitly recognizes the existing absolute prohibition of torture and other ill-treatment in customary international law. While incorporating the extant norms that constitute the "common ground" upon which it is based, the Convention's provisions expressly focus on defining torture and codifying attendant deterrent and preventive obligations.[18] The Committee against Torture, in its general comment No. 2 (2008), found that article 2 in particular "undergird[ed] the Convention's absolute prohibition against torture [and] reinforce[d] th[at] peremptory *jus cogens* norm" by obliging States parties to take actions that would reinforce the extant prohibition against torture. Article 2 (2) and (3), indicating that no exceptional circumstances may ever be invoked as a justification for torture, would be absurd in the absence of an implied global ban on acts of torture and other ill-treatment, as would the Convention's aim to make "more effective the struggle against torture and other [ill-] treatment or punishment throughout the world". An analogy may be drawn with the Convention on the Prevention and Punishment of the Crime of Genocide, which places States parties under an obligation not to commit genocide even though the obligation is not expressly stated. This is because of the Convention's object and purpose to "condemn and punish genocide as a 'crime under international law'" and its underlying principles that are universally "recognized by civilized nations as binding on States, even without any conventional obligation".[19]

27. The Special Rapporteur accordingly reminds States that the *jus cogens* non-derogable prohibition against torture and ill-treatment cannot be territorially limited and that any jurisdictional references found in the Convention against Torture cannot be read to restrict or limit States' obligations to respect all individuals' rights to be free from torture and ill-treatment, anywhere in the world. This prohibition and attendant obligations — such as the obligation to investigate, prosecute and punish every act of torture and ill-treatment, to exclude evidence

[18] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford, Oxford University Press, 2008).

[19] International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 161.

obtained by torture and other ill-treatment from all proceedings and to refrain from enabling refoulement to torture or other ill-treatment — are norms of customary international law.[20]

E. Jurisdictional clauses in the Convention and the Optional Protocol

28. While most of the provisions of the Convention against Torture have no spatial limitation, jurisdictional clauses are found in articles 2 (1), 5 (1) (a), 5 (2), 6 (1), 7 (1), 11, 12, 13 and 16 (1). Article 4 (1) of the Optional Protocol to the Convention also contains such a clause. The Special Rapporteur finds that the Convention and the Optional Protocol limit to "any territory under [a State's] jurisdiction" or "any place under its jurisdiction and control" a small number of positive obligations, the implementation of which is necessarily dependent on the exercise of a sufficient measure of control over an individual, area, place or situation. In this sense, it is uncontroversial that the Convention obliges States to take certain positive measures only when they exercise sufficient authority to be able to do so. Even while recognizing that States' obligations to fulfil certain positive obligations are practicable only in certain situations, States' negative obligations under the Convention are not per se spatially limited or territorially defined, nor are its obligations to cooperate to end torture and other ill-treatment.

29. The Convention's drafting history reveals a preoccupation with balancing the practicability of implementing its provisions rather than an intent to limit the ability to hold States responsible for extraterritorial acts of torture or ill-treatment or to dilute the strength of its applicability. From the original phrasing of the 1978 draft by Sweden, four provisions — articles 11, (5) (1) (a), 5 (2) and 7 (1) — were in fact broadened during drafting from initial reference to "territory" to "any territory under its jurisdiction", with the initial reference to territory alone being rejected as too restrictive. In article 2 (1), the addition of "territory" to the initial reference to "jurisdiction" was intended to avoid the Convention's applicability being triggered by the nationality principle alone. There is also support for the argument that the same formulation was adopted in articles 12, 13 and 16 to ensure textual consistency.[21] That the drafting history reveals changes from references to both "jurisdiction" and "territory" alone to "any territory under its jurisdiction" can be understood to reflect practical concerns rather than a wish to limit the Convention's extraterritorial applicability. A literal reading of the Convention's jurisdictional clauses clearly contradicts its object and purpose and gives rise to impermissible loopholes in its protections.

30. The Convention's drafters explain that the clause "any territory under its jurisdiction" in article 5 (1) suggests a factual situation whereby the obligation to establish criminal jurisdiction is not limited to a State's land territory or territorial sea and airspace, but also applies to territories under military or colonial occupation and any other territories over which a State has factual control. If, for example, torture is committed on an oil rig or other installation on the continental shelf of a State party, that State "should be required to have [criminal] jurisdiction over the

[20] See, e.g., Office of the United Nations High Commissioner for Refugees, "Note on the principle of non-refoulement", 1997.

[21] Karen Da Costa, "The extraterritorial application of selected human rights treaties", *Human Rights Law Review*, vol. 14, No. 4 (2013).

offense".[22] Under the same rationale, the obligation to establish criminal jurisdiction over acts of torture committed by State agents extends also to situations of military presence or operations in a foreign country, with the consent of the local State, which are not strictly speaking governed by the rules of military occupation.

F. Positive obligations to prevent torture and other ill-treatment

31. Aside from the stated obligation to refrain from actions prohibited by international law and to respect the prohibition against torture and other ill-treatment, States also have an obligation to ensure or protect individuals' rights when they are in a position to do so by virtue of control over an area or over the persons in question. In this vein, the Human Rights Committee mandates that States are responsible for ensuring the application of the International Covenant on Civil and Political Rights in respect of acts perpetrated by actors, such as armed groups, abroad to the extent that they exercise influence amounting to "effective control over their activities" (CCPR/C/RUS/CO/7, para. 6).

32. The obligation enshrined in article 2 of the Convention, which requires States to take effective legislative, administrative, judicial and other measures to prevent torture in "any territory under [their] jurisdiction", applies to all areas and places "where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control"; furthermore, the scope of "territory" in article 2 encompasses "situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention"[23] and applies to "all persons under the effective control of its authorities, of whichever type, wherever located in the world" (CAT/C/USA/CO/2, para. 15). The Committee has clarified that this applies to all provisions expressed as applicable to territory under the State party's jurisdiction, which further apply, inter alia, to the prohibition against other ill-treatment contained in article 16.

33. The Special Rapporteur concludes that the clause "any territory under its jurisdiction" cannot be invoked to limit the applicability of the relevant obligations to territory under States parties' de jure control because such an interpretation would be contrary to the Convention's object and purpose, authoritative interpretations by the Committee, jurisprudence and common interpretations of the term "jurisdiction" under international law and would be in derogation of absolute norms of customary international law and of a *jus cogens* nature. States have international legal obligations to safeguard the rights of all individuals under their jurisdiction (A/HRC/25/60), even extraterritorially. The obligation to take preventive measures under articles 2 (1) and 16 (1) clearly encompasses action taken by States in their own jurisdictions to prevent torture or other ill-treatment extraterritorially.

34. Furthermore, the use of the phrasing "any territory under its jurisdiction" in articles 11-13 reflects a common-sense drafting choice that cannot be interpreted as intending to limit a State's obligations to take preventive measures against torture and ill-treatment when in fact it is compelled to do so by a factual situation that

[22] J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Nijhoff, 1988).

[23] Committee against Torture, general comment No. 2 (2008), para. 16.

entails the State's actual control or authority over an area, place or person outside its territory. For example, the preventive obligations enshrined in article 11 that require a systematic review of interrogation rules for custody and treatment of persons in detention cannot be interpreted as limiting States' obligations to their sovereign territories or places over which they exercise complete governmental authority (CAT/C/USA/CO/3-5). Rather, the clause denotes a particular factual situation and the obligations enshrined in the article apply by virtue of the authority or control wielded by State agents involved in the arrest, detention, imprisonment or interrogation of persons abroad, in places such as in Bagram and Abu Ghraib in Iraq and other extraterritorial detention facilities such as Central Intelligence Agency "black sites" or offshore refugee processing centres. Likewise, the obligations enshrined in articles 12 and 13 must also be triggered by virtue of a State's exercise of de jure or de facto control over a particular area, detention facility or individual. By contrast, the obligations enshrined in article 10 do not contain a spatial reference, given that their practical implementation is not contingent upon the State party's control or authority over a particular individual or area. As explained by a former mandate holder, if a soldier of State A under the command of State B in a peacekeeping operation in State C were to commit an act of torture, State A could be responsible for failure to provide appropriate training under article 10 (State B and the United Nations might also be responsible).[24]

35. International and regional jurisprudence clearly indicates that, whenever a State exercises effective control over a territory, area, place or person outside its borders, it is required not only to abstain from unlawful acts but also to ensure a broader range of positive human rights obligations. States have positive obligations to protect individuals against infringement of their rights and preventive obligations to ensure that actors over whom they have jurisdiction, including extraterritorially, do not engage in or contribute to acts of torture.[25] While clearly responsible for wrongful acts committed extraterritorially or having an extraterritorial effect, a State may also be responsible for "indirectly attributable extraterritorial wrongfulness" owing to a failure to fulfil its positive human rights obligations. In such scenarios the criterion of "effective control" may be taken into account to assess the standards of due diligence that a State is legally obliged to demonstrate in a given situation.[26]

36. The Special Rapporteur reminds States that monitoring places of deprivation of liberty is key to preventing torture and other ill-treatment. The scope of article 4 (1) of the Optional Protocol mandating visits to "any [such] place under [a State's] jurisdiction and control" must be interpreted to encompass places of deprivation of liberty outside the State's sovereign territories, including military detention facilities overseas.[27] Visits must be permitted anywhere that States have effective control over places of detention outside their territories.

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[24] Manfred Nowak, "Obligations of States to prevent and prohibit torture in an extraterritorial perspective" in Mark Gibney and Sigrun Skogly, eds., *Universal Human Rights and Extraterritorial Obligations* (Philadelphia, University of Pennsylvania Press, 2010).

[25] See, e.g., Committee on the Rights of the Child, general comment No. 16 (2013) and documents CCPR/C/DEU/CO/6, CERD/C/USA/CO/6, E/C.12/FIN/CO/6 and E/C.12/CHN/CO/2.

[26] Vassillis Tzevelekos, "Reconstructing the effective control criterion in extraterritorial human rights breaches", *Michigan Journal of International Law*, vol. 36, No. 1 (2015).

[27] Association for the Prevention of Torture, "The application of OPCAT to a State Party's places of military detention located overseas", Legal Briefing Series, October 2009.

37. The duty of States parties under article 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) to "secure" to everyone within their jurisdiction the rights and freedoms of the Convention also includes positive obligations to protect individuals against infringements by third parties, including private individuals or organs of third States operating within the State party's jurisdiction. The Convention has recognized positive obligations that flow from the prohibition of torture and inhuman treatment, including the duties to investigate and to provide for effective remedies. The Special Rapporteur agrees that "practical difficulties" encountered by States in securing the effective enjoyment of relevant rights in some extraterritorial scenarios can never displace their positive duties to guarantee and ensure these rights at all times.[28] The Special Rapporteur contends that the positive obligation of the State to protect persons within their jurisdiction from torture and ill-treatment requires the implementation of safeguards.[29] These include, but are not limited to, the right to legal assistance,[30] access to independent medical assistance (E/CN.4/2003/68), notification of detention and communication with the outside world (A/HRC/13/39/Add.3) and the right of individuals deprived of their liberty in any situation to challenge the arbitrariness or lawfulness of their detention and receive remedies without delay. Such obligations apply whenever States detain persons extraterritorially, including during international military operations, when the obligations to guarantee humane treatment and respect for detainees' physical and psychological needs, including adequate conditions of detention and protection from the dangers of military operations, remain intact (Copenhagen Principles).[31]

G. Non-refoulement and migration

38. The obligation to take measures to prevent acts of torture or other ill-treatment includes actions that a State takes in its own jurisdiction to prevent such acts in another jurisdiction. The non-refoulement principle obliges States not to expose individuals to real risks of torture or other ill-treatment by expulsion, extradition or refoulement to another State (see A/53/44 and Corr.1);[32] the individual being transferred need not cross an international border for this obligation to apply. Non-refoulement is "an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment" (A/59/324, para. 28) and a rule of customary international law. The non-refoulement prohibition is codified in article 3 of the Convention, which is not geographically limited on its face. In *Soering v. The United Kingdom*, the European Court of Human Rights found that the extraditing State would be responsible for a breach of that norm, even where the mistreatment at issue would be subsequently beyond its control. States are required to abstain from acting within their territories and spheres of control in

[28] Council of Europe, European Commission for Democracy Through Law (Venice Commission), opinion No. 363/2005, 17 March 2006.

[29] See Human Rights Committee, general comment No. 32 (1992) and General Assembly resolution 55/89.

[30] European Court of Human Rights, *Pishchalnikov v. The Russian Federation* (2009); European Committee for the Prevention of Torture, *CPT Standards* (2002).

[31] The Copenhagen Process on the Handling of Detainees in International Military Operations. Available from http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf.

[32] See also Human Rights Committee, *Chitat Ng v. Canada*.

manners that expose individuals transferred outside their territory or control to a real risk of torture or other ill-treatment. That the prohibited acts occur outside the territory or the direct control of the State in question does not relieve that State from responsibility for its own actions vis-à-vis the incident (E/CN.4/2002/137). Refoulement may implicate extraterritorial State conduct whenever States operate and hold individuals abroad, as in the context of armed conflict or offshore detention or refugee processing facilities. Whenever States are operating extraterritorially and are in a position to transfer persons, the prohibition against non-refoulement applies in full.[33] A finding to the contrary would contravene the object and purpose of the Convention and amount to a breach of the non-derogable norms underlying the non-refoulement principle (CAT/C/CR/33/3; CAT/C/USA/CO/2). A person under the authority of State agents anywhere cannot be returned when facing risk of torture.

39. The European Court has consistently held that the absolute nature of the prohibition on torture and other ill-treatment implies a positive obligation not to send individuals to States where they face a real risk of prohibited treatment (*Saadi v. Italy*). A State's responsibility is engaged whenever its agents fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known at the time of transfer (*Abu Zubaydah v. Poland*). The Committee against Torture similarly has found that State decisions to expel or render individuals to places where they face a real risk of ill-treatment breaches the Convention (*P. E. v. France*).

40. The Committee has stressed that the procurement of diplomatic assurances cannot be used by States to escape their absolute obligation to refrain from non-refoulement (*Agiza v. Sweden*). A previous holder of the mandate has explained that diplomatic assurances are "unreliable and ineffective" in the protection against torture and other ill-treatment, with post-return monitoring mechanisms doing little to mitigate the risk of torture (A/60/316, para. 51). States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to such treatment (General Assembly resolution 60/148, para. 8).

41. The absolute prohibition against refoulement, which is aimed at protecting individuals from torture and other ill-treatment, is stronger than that found in refugee law, meaning that persons may not be returned even when they may not otherwise qualify for refugee or asylum status under article 33 of the 1951 Convention relating to the Status of Refugees or domestic law. Accordingly, non-refoulement under the Convention against Torture must be assessed independently of refugee or asylee status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed.

42. The obligations enshrined in the Convention also apply to State vessels patrolling or conducting border control operations on the high seas and States' pushbacks of migrants under their jurisdiction can breach the prohibition of torture and ill-treatment and non-refoulement obligations. In the context of migration control, the Special Rapporteur has urged migration authorities to ensure that measures do not further traumatize victims; that there are alternatives to detention;

[33] Emanuela-Chiara Gillard, "There's no place like home: States' obligations in relation to transfers of persons", *International Review of the Red Cross*, vol. 90, No. 871 (September 2008).

that reception centres comply with international human rights standards; and that migrants and asylum seekers should be individually assessed, including their need for protection. This is in line with the pronouncement by the Human Rights Committee that these safeguards apply to all individuals regardless of nationality or statelessness, including asylum seekers, refugees, migrant workers and other persons in the territory or subject to the jurisdiction of the State party.

43. States' non-refoulement obligations also embrace fundamental procedural obligations and rights that cannot be bypassed.[34] First and foremost is the obligation to offer individuals a fair opportunity to make claims for refugee or asylum status, including the right not be returned to places where they risk being subjected to torture or other ill-treatment. In addition, there is the right to challenge detention and potential transfer (Committee against Torture, *Arana v. France*) on the basis of fear of mistreatment in the receiving State, which may be understood as a substantive guarantee of non-refoulement, part of the right to an effective remedy and inherent in the right to due process of law (Inter-American Court of Human Rights, *United States Interdiction of Haitians on the High Seas*). This challenge must take place prior to transfer (Human Rights Committee, *Alzery v. Sweden*), before an independent decision maker with the power to suspend the transfer during the pendency of the review and must be an individualized procedure incorporating timely notification of potential transfer and the right to appear before this independent body in person (*Agiza v. Sweden*). This inquiry is separate and independent from the determination of refugee status or grant or refusal of asylum.

H. Obligation to investigate, prosecute and punish and bring perpetrators to justice

44. The Special Rapporteur reminds States that the core purpose of the Convention against Torture was the universalization of a regime of criminal punishment for perpetrators of torture, building upon the regime already in existence under international human rights, customary international law and international humanitarian law. By its terms, the Convention provides for far-reaching extraterritorial obligations to bring perpetrators of torture to justice. Article 5 (1) obliges States to establish jurisdiction over all acts of torture on the territoriality, flag, active nationality and passive nationality principles. All States have a customary international law obligation to investigate, prosecute and punish all acts of torture and other ill-treatment as codified, inter alia, in the Convention.

45. Article 5 (1) requires States to take legislative measures to establish jurisdiction based on the territoriality, flag and active and passive nationality principles with a view to prosecuting any act of torture committed in "any territory under [the State's] jurisdiction" and to take all measures necessary to investigate the crime, arrest the alleged offender and bring him or her to justice before its domestic courts.[35] In the example provided by a former mandate holder, if an Egyptian intelligence agent on board a Central Intelligence Agency rendition aircraft registered in the United States were to torture a Jordanian citizen when flying

[34] Margaret Satterthwaite, "The legal regime governing transfer of persons in the fight against terrorism" in *Counter-Terrorism Strategies in a Fragmented International Legal Order*, L. van den Herik and N. Schrijver, eds. (Cambridge, Cambridge University Press, 2013).

[35] Nowak, "Obligations of States".

through Irish airspace, Egypt, the United States and Ireland would all be required to investigate the case and issue an arrest warrant (as would be Jordan, upon accepting the passive personality principle). In recognition of the obligation to investigate and prosecute all acts of torture, Italian courts convicted in absentia 23 United States and two Italian officials involved in the abduction and extraordinary rendition of Abu Omar to Egypt, where he was tortured.[36]

46. The Convention requires States to criminalize all acts of torture "wherever they occur, and to establish criminal jurisdiction over various extraterritorial acts of torture, including universal jurisdiction when an offender is present in 'any territory under its jurisdiction'".[37] Universal jurisdiction exists in recognition that some international norms are *erga omnes*, that is, owed to the international community as a whole. At a minimum, the domestic courts of all States have the power to prosecute under international law those responsible for crimes against humanity, war crimes (including serious violations of common article 3 of the Geneva Conventions of 12 August 1949 on the protection of victims of war), genocide and torture.

47. Article 5 (2) establishes the obligation to bring perpetrators to justice (to investigate, prosecute and punish) under the universal jurisdiction principle, requiring that each State party must take the measures necessary to establish its jurisdiction over relevant offences in cases where the alleged offender is present in "any territory under its jurisdiction" and it does not extradite him or her. The clause "any territory under its jurisdiction" clearly refers to the alleged offender's presence in any territory under the State's jurisdiction at the time of prospective apprehension, as opposed to denoting the locus of the act of torture. The latter would be an implausible, textually unfounded interpretation and would defeat the Convention's object and purpose. As explained by Danelius, discussions during the drafting process:

> Centred round the concept of so-called universal jurisdiction [and] whether each State should undertake ... to assume jurisdiction not only based on territory or the offender's nationality but also over acts of torture committed outside its territory by persons not being its nationals. The principle of universal jurisdiction — which had already been accepted in conventions against hijacking of aircraft and other terrorist acts — was eventually accepted and found its place in article 5(2).[38]

48. This universal jurisdiction is generally considered permissive. On the other hand, the rule of *aut dedere aut judicare* is clearly mandatory. This is further complemented by article 7 (1) of the Convention, which requires States to provide for universal jurisdiction over extraterritorial acts of torture whenever the forum State fails to extradite a suspect under the principle of *aut dedere aut judicare*. Article 6 (1) also unconditionally requires States to detain persons suspected of having committed torture found in their territories without limiting the act to torture committed in territories subject to the jurisdiction of the State party, or to ensure his or her presence at criminal or extradition proceedings.

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[36] Corte di Cassazione, sentenza 46340, 19 September 2012.

[37] Koh, "Memorandum opinion".

[38] Hans Danelius, "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: introductory note", 2008. Available from http://legal.un.org/avl/ha/catcidtp/catcidtp.html.

49. The Committee against Torture confirmed this finding in *Guengueng and others v. Senegal*, finding that Senegal had an obligation under article 5 (2) to prosecute the former President of Chad on the basis of universal jurisdiction. The Committee found that Senegal had failed to meet its obligations under article 5 (2), rejecting the State's argument that Senegalese legislation did not provide for universal jurisdiction to prosecute presumed accomplices or perpetrators of torture "when these acts have been committed outside Senegal by foreigners". The Committee recalled that article 5 (2) obliged the State party "to adopt the necessary measures, including legislative measures, to establish its jurisdiction over the acts" in question. It further cited article 7, which put "the State party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished". The International Court of Justice, in *Questions Relating to the Obligation to Prosecute or Extradite*, similarly confirmed States' obligations under the Convention to either prosecute or extradite alleged perpetrators of torture to another State with jurisdiction for prosecution. The obligation to prosecute or extradite includes torture committed by non-State actors acting "in an official capacity", especially de facto regimes. In *R. v. Zardad*, the Central Criminal Court of England and Wales tried and convicted a member of Hezb-i-Islami in Afghanistan for conspiracy to commit torture.

50. In *R. v. Pinochet* (No. 3), the United Kingdom House of Lords approved the extradition of the former President of Chile to face torture charges in Spain, finding that the "*jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed". Offences constituting *jus cogens*, such as torture, may be punished by any State because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution".[39] It is illustrative that at least 85 States provide in their domestic law for universal jurisdiction over torture. The Special Rapporteur welcomes instances of States' exercise of universal jurisdiction to investigate international crimes such as torture, war crimes and crimes against humanity committed extraterritorially by or against non-citizens as a means to combat impunity.[40]

51. The Special Rapporteur regrets evidence that States have employed restrictive doctrines, such as State secrets and political questions doctrines,[41] in both territorial and extraterritorial contexts, in an effort to obstruct prosecution and evade responsibility (*El-Masri v. The United States*), and reminds States that competent courts in States parties to the Convention are obligated to exercise jurisdiction over acts of torture and ill-treatment, irrespective of the locus where wrongfulness took place. This obligation should also encompass situations wherein a State may be held responsible for its failure to pre-empt or remedy illicit conduct not directly attributable to it, such as when it failed to meet its due diligence obligations to prevent and protect persons from grave violations of human rights. The Supreme Court of the Netherlands recognized in the Dutch battalion case that the State was

[39] See, e.g., United States Court of Appeals, *Demjanjuk v. Petrovsky and others* (1985).

[40] Constitutional Court of South Africa, *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another* (2014).

[41] United States federal courts will refuse to hear a case if they find that it presents a "political question".

responsible for the deaths of three men at Srebrenica, Bosnia and Herzegovina, by failing to shield the victims when they sought refuge in a Dutch compound over which the State exercised "effective control" — defined as "factual control over specific conduct" — under article 8 of the draft articles on the responsibility of States for internationally wrongful acts. The Special Rapporteur welcomes the indication that States are not simply required to abstain from causing prohibited acts but are obligated, to the extent possible, to fight wrongfulness, including through investigation and prosecution of torture.

I. Exclusionary rule

52. The exclusionary rule contained in article 15 of the Convention, mandating that States not invoke as evidence in any proceedings statements obtained as a result of torture, is not territorially limited on its face.[42] The exclusionary rule forms a part of, or is derived from, the general and absolute prohibition of torture and other ill-treatment (Human Rights Committee, general comment No. 20 (1992); Committee against Torture, *G.K. v. Switzerland*) and, as such, is not derogable under any circumstances and will apply to States that are not party to the Convention (A/HRC/25/60). The prohibition is considered a rule of customary international law that flows from the absolute nature of the prohibition of torture. Its object is to discourage and disincentivize torture by disallowing admission of "tainted" evidence and to provide for fair trials.

53. Although the exclusionary rule is not expressly listed among the rules that apply both to torture and to other ill-treatment under article 16 of the Convention, it has repeatedly been made clear that statements and confessions obtained under all forms of ill-treatment must be excluded in legal proceedings.[43] The exclusionary rule is applicable no matter where the torture or ill-treatment was perpetrated and even if the State seeking to rely on the evidence in question had no prior involvement in, or connection to, the acts of torture (CAT/C/CR/33/3). In addition, the exclusionary rule applies not only where the victim of torture or ill-treatment is the actual defendant, but also where statements by third parties allegedly obtained by torture are concerned (Committee against Torture, *Ktiti v. Morocco*). The application of this rule is not restricted to criminal proceedings but applies to all proceedings, including extradition proceedings.

54. The Committee (*P.E. v. France*; *Agiza v. Sweden*; *Pelit v. Azerbaijan*; *Dzemajl v. Yugoslavia*), the European Court of Human Rights (*Othman v. The United Kingdom*) and the African Commission on Human and Peoples' Rights (*Egyptian Initiative for Personal Rights and Interights v. Egypt*) have firmly ruled against the use of evidence obtained by torture, demonstrating that international law has declared its unequivocal opposition to the admission of such evidence. The Special Rapporteur recalls that all States have an obligation to ascertain whether statements admitted as evidence in any proceedings for which they have jurisdiction, including extradition proceedings, have been made as a result of torture (*G.K. v. Switzerland*).

[42] *A. and others v. Secretary of State for the Home Department*, United Kingdom House of Lords (2005).

[43] Committee against Torture, general comment No. 2 (2008).

J. Remedies

55. The right to a remedy is fundamental under international law[44] and must be accessible to victims irrespective of where the violation occurred or whether the State exercising jurisdiction is the perpetrator. The Convention requires States parties to ensure in their legal systems that the victims of torture obtain redress, encompassing the concept of "effective remedy", the right to which underpins the entire Convention.[45] Under customary international law a State's duty to make reparation for an injury is inseparable from its responsibility for commission of an internationally wrongful act (see A/56/10 and Corr.1) and, as such, the right to an effective remedy is applicable extraterritorially. It encompasses a right to know the truth about past events concerning the perpetration of serious international crimes, as reflected in international legal documents (E/CN.4/2005/102/Add.1)[46] and jurisprudence.[47] The United States Torture Victims Protection Act in fact provides an example of how States parties can carry out their obligations under article 14 of the Convention.

56. The Special Rapporteur notes that article 14 is not geographically limited on its face and will apply no matter where the torture takes place (CAT/C/CR/34/CAN). The Committee authoritatively states that the application of article 14 is not limited to victims who were harmed in the territory of the State party or to torture committed by or against nationals of the State party. States must provide restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition to victims of torture.[48] The understanding submitted by the United States that article 14 was limited to territory under a State's jurisdiction[49] is at odds with its legislation (Alien Tort Claims Act) and jurisprudence.[50] It has been rejected by subsequent action, such as the enactment of the Torture Victim Protection Act, and in any event indicates the otherwise comprehensive extraterritorial applicability of the article.

57. The obligation to provide an effective remedy applies "irrespective of who may ultimately be the bearer of responsibility for the violation",[51] which is essential to ensuring that all persons, including migrants and non-citizens, are afforded their fundamental rights without discrimination. States' obligations to provide redress are both substantive and procedural,[52] wherein States must establish judicial or administrative bodies capable of determining a torture victim's right to redress, awarding such redress and ensuring accessibility of these forums to victims

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[44] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, annex.

[45] Committee against Torture, general comment No. 3 (2012).

[46] See also *The Global Principles on National Security and the Right to Information (Tshwane Principles)* (New York, Open Society Foundation, 2013).

[47] Inter-American Court of Human Rights, *Ellacuría v. El Salvador* (1999); *Galdámez v. El Salvador* (2000); *Velásquez-Rodríguez v. Honduras* (1988).

[48] Basic Principles, para. 18.

[49] Message from the President transmitting the Convention against Torture to the Senate, 20 May 1988 (Sen. Treaty Doc. 100-20).

[50] See, e.g., *Filartiga v. Peña-Irala* (1980); *Samantar v. Yousuf* (2010).

[51] Basic Principles, para. 3 (c).

[52] Committee against Torture, general comment No. 2 (2008).

(A/69/277).[53] In the case of migrants, the recommended principles and guidelines on human rights at international borders developed by the Office of the United Nations High Commissioner for Human Rights[54] note States' obligation to afford remedies against removal orders where there are substantial grounds for believing that the persons removed would be at a risk of torture or other ill-treatment if "returned to, readmitted, or subject to onward return to a place where they might be at such risk" (guidelines 9), and further to ensure that torture and ill-treatment survivors are referred to proper rehabilitation services.

58. A State's failure to investigate, criminally prosecute or allow civil proceedings — or efforts to block or hinder such proceedings — relating to allegations of torture or other forms of ill-treatment constitutes de facto denial of an effective remedy.[55] The Special Rapporteur regrets that this has been the case regarding victims of rendition and other extraterritorial acts of torture and ill-treatment seeking redress from Governments[56] and reminds States that an essential component of the obligation to provide redress is the obligation not to obstruct redress[57] or obstruct access of an individual to an effective remedy, for example by invoking "State secrets" to dismiss lawsuits *in limine litis*.

59. The Special Rapporteur recognizes that some States have provided financial compensation to victims of extraordinary rendition and secret detention as part of undisclosed out-of-court settlements for complicity in torture or other ill-treatment abroad in response to civil suits.[58] The Special Rapporteur welcomes this step in the right direction but insists that strict compliance with international law requires States to provide compensation pursuant to a finding of wrongdoing through available legal mechanisms.

60. The Special Rapporteur commends efforts to legislate an exception to State immunity in civil cases for torture and other serious crimes under international law.[59] Although States do not as a matter of practice accord a civil remedy for torture committed by foreign States abroad,[60] the law may be evolving in this direction.[61] The Committee has commended the efforts of States parties to provide civil remedies for persons subjected to torture outside their territory, noting that this is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place and that article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access a remedy and obtain redress (CAT/C/CR/34/CAN).

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[53] This will include access to legal assistance.

[54] Available from www.ohchr.org/EN/Issues/Migration/Pages/InternationalBorders.aspx.

[55] Committee against Torture, general comment No. 3 (2012).

[56] See, e.g., for the United States, *El-Masri v. The United States* (2006); *Arar v. Ashcroft* (2009); *Mohammed v. Jeppesen* (2010).

[57] See, e.g., Inter-American Court of Human Rights, *Contreras v. El Salvador* (2011); *Rio Negro Massacres v. Guatemala* (2012).

[58] See, e.g., Prime Minister of Canada, "Letter of apology to Maher Arar and his family", 2007; United Kingdom Ministry of Justice Memorandum, "Joint Committee on Human Rights inquiry into Justice and Security Green Paper", 2011.

[59] See, inter alia, Torture Victim Protection Act of 1991, Alien Tort Statute and Foreign Sovereign Immunities Act (United States); Torture Damages Bill (2010) (United Kingdom).

[60] International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

[61] See, e.g., Committee against Torture, general comment No. 3; CAT/C/CR/34/CAN; Supreme Court of Italy, *Ferrini v. Federal Republic of Germany* (2004).

61. The argument that the *jus cogens* status of the prohibition of torture takes precedence over the customary right to State immunity[62] or constitutes an "implied waiver" of State immunity[63] has not been accepted by courts, which have found that the peremptory norm of prohibition against torture does not encompass a civil remedy.[64] Nevertheless, it has not been discounted that this approach may change (*Al-Adsani*). While courts have additionally discounted the argument of "last resort" (*Jurisdictional Immunities*), that is, where there is no alternative forum for a hearing, the Special Rapporteur considers that denying a torture victim access to judicial remedies is a violation of State obligations under article 14, undermining the international community's commitment to the elimination of torture.[65]

K. Extraterritoriality and the laws of armed conflict

62. Under the Convention the prohibition and prevention of torture and other ill-treatment will apply at all times, including in situations of armed conflict and concurrently with applicable norms of international humanitarian law. This is evidenced by textual aspects of the Convention that explicitly address armed conflict and military activities, according to which no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture, as well as aspects of its negotiating history (E/CN.4/1984/72). International human rights law remains applicable during armed conflict and the protection offered under human rights law does not cease during hostilities (without prejudice to the application of the *lex specialis* rule under appropriate circumstances).[66] In addition, the humane treatment requirements under the Convention and international humanitarian law are substantially equivalent, both prohibiting torture and other ill-treatment in international and non-international armed conflicts, with common article 3 of the Geneva Conventions of 12 August 1949 constituting a minimum baseline of protections applicable at all times, including during non-international armed conflicts.[67] The Special Rapporteur contends that the universal legal regime for the prohibition and prevention of torture is indeed strengthened by the intersection of multiple subsystems and specialized regimes outlawing torture and other ill-treatment. Torture constitutes a grave breach of the Geneva Conventions, a violation of common article 3 and a violation of customary international humanitarian law. Under international criminal law, torture can also constitute a crime against humanity or an act of genocide.

63. The Special Rapporteur finds that the prevention and prohibition of torture and other ill-treatment under the Convention are indeed complementary to the

[62] European Court of Human Rights, *Al-Adsani v. The United Kingdom* (Dissent) (2001); United States Court of Appeals, *Princz v. Federal Republic of Germany* (Dissent) (1995); *Ferrini*; International Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija* (1998).

[63] *Princz* (Dissent); International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), I.C.J. Reports 2002*, p. 3 (Joint Separate Opinion).

[64] *Jurisdictional Immunities*; cf. United States Supreme Court, *Sosa v. Alvarez-Machain* (2004) and United States Court of Appeals, *Filartiga v. Peña-Irala* (1980), finding that universal civil jurisdiction is available for acts of torture.

[65] Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, 2011.

[66] See, e.g., Security Council resolution 237 (1967).

[67] International Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić* (1999).

prevention and prohibition of torture and other ill-treatment under international humanitarian law.[68] Torture and other forms of ill-treatment are specifically prohibited under numerous provisions of the Geneva Conventions and the Additional Protocols thereto, including regarding prisoners of war, the wounded and sick, protected civilians and persons detained in non-international armed conflicts. Perpetration of such acts will constitute a grave breach of international humanitarian law and a war crime under the Rome Statute of the International Criminal Court and will engender a right to an effective remedy.

64. In addition, obligations imposed under international humanitarian law that are more protective than those under the Convention will be accommodated under its savings clauses (arts. 1 (2) and 16 (2)), including the application of the "overall control" test (*Tadić*), rather than the "effective control" test espoused under human rights law, and the broader definition of torture wherein there is no public official requirement.[69] Notably, prohibitions against torture found in international humanitarian law and international criminal law do not necessarily require a showing of State action, indicating that non-State actors can be responsible for torture.

IV. Conclusions and recommendations

65. **The *jus cogens* non-derogable prohibition against torture and other ill-treatment cannot be territorially limited. Whenever States bring a person within their jurisdiction by exercising control or authority over an area, place, individual or transaction they are bound by their fundamental obligation not to engage in or contribute to such acts. States moreover have an obligation to protect persons from torture and other ill-treatment and to ensure a broad range of attendant human rights obligations whenever they are in a position to do so by virtue of their control or influence extraterritorially over an area, place, transaction or persons. The obligation to prevent prohibited acts includes action that States take in their own jurisdictions to prevent such acts in another jurisdiction. This includes obligations to ensure that private actors over whom they have control or influence do not engage in or contribute to torture or other ill-treatment. Violations can arise from States' direct perpetration, omissions or acts of complicity with extraterritorial components. States are obliged, to the extent possible, to fight wrongfulness and to ensure cooperation in efforts and proceedings designed to end, uncover, remedy or prosecute and punish torture and other ill-treatment.**

66. **Most provisions of the Convention against Torture are not territorially limited and extant jurisdictional references cannot be read to restrict or limit States' obligations to respect the rights of all persons, anywhere in the world, to be free from torture and ill-treatment. The reference "any territory under [a State's] jurisdiction" in the relevant clauses cannot be invoked to limit the applicability of the relevant obligations to the sovereign territory or territory**

[68] *Legal Consequences of the Construction of a Wall*; Inter-American Court of Human Rights, *Serrano-Cruz Sisters v. El Salvador* (2004).

[69] International Tribunal for the Former Yugoslavia, *Prosecutor v. Kunarac, Kovac and Vukovic* (2001).

under de jure control of States parties, or where a State party exercises control as a "governmental authority".

67. **The Special Rapporteur calls upon States to recognize that their obligations under articles 2 and 16 of the Convention to take steps to prevent torture and other ill-treatment in "any territory under [their] jurisdiction" encompass all areas in which the State exercises, in whole or in part, de jure or de facto effective control, as well as all persons under the State's effective control, and action taken in its own jurisdiction to prevent torture or other ill-treatment extraterritorially, including by third parties or organs of third States operating within the jurisdiction of the State party concerned. This includes measures taken by States in their own jurisdiction to prevent torture or other ill-treatment abroad.**

68. **The Special Rapporteur calls upon all States to implement safeguards to protect persons within their jurisdiction extraterritorially from torture and other ill-treatment. Such safeguards include, but are not limited to, the rights to independent legal and medical assistance; notification of detention and communication with the outside world; and to challenge the arbitrariness or lawfulness of detention and obtain remedies without delay.**

69. **The absolute prohibition of non-refoulement applies at all times, even when States are operating or holding individuals extraterritorially, including border control operations on the high seas. The procurement of diplomatic assurances, which are inherently unreliable and ineffective, cannot be used by States to escape the absolute obligation to refrain from refoulement. The Special Rapporteur calls upon States to assess non-refoulement under the Convention against Torture independently of refugee or asylee status determinations, so as to ensure that the fundamental right to be free from torture or other ill-treatment is respected even in cases where non-refoulement under refugee law may be circumscribed. States are required to afford individuals fundamental procedural obligations in connection with their non-refoulement obligations, including, but not limited to a fair opportunity to state claims for refugee or asylee status and the right to challenge detention and potential transfer on the basis of mistreatment in a receiving State (a) prior to transfer; (b) before an independent decision maker with the power to suspend the transfer; and (c) through an individualized procedure incorporating timely notification of potential transfer and the right to appear before this independent body in person.**

70. **All States have an international customary law obligation to investigate, prosecute and punish all acts of torture and other ill-treatment and to criminalize such acts wherever they occur. States should establish universal criminal jurisdiction over extraterritorial acts of torture. Under the principle of *aut dedere aut judicare*, States are required to prosecute alleged perpetrators of torture under their jurisdiction or to ensure their presence at criminal or extradition proceedings. The Special Rapporteur calls upon States to exercise jurisdiction over acts of torture and ill-treatment, regardless of the locus where wrongfulness took place. A State may be held responsible for its failure to pre-empt or remedy illicit conduct not directly attributable to it, such as when it fails to meet its due diligence obligations to prevent and protect persons from grave violations of human rights.**

71. **The exclusionary rule — mandating that States not invoke as evidence in any proceedings statements obtained as a result of torture — is not territorially limited, encompasses all forms of ill-treatment and is applicable no matter where the mistreatment was perpetrated. The Special Rapporteur calls upon States to ascertain whether statements admitted as evidence in any proceedings for which they have jurisdiction, including extradition proceedings, were made as a result of torture or other ill-treatment.**

72. **Victims have a fundamental right to a remedy that must be accessible regardless of where the violation occurred or whether the State exercising jurisdiction is the perpetrator State. An essential component of this obligation to provide redress is that States do not block or obstruct access to effective remedies by invoking "State secrets" or other doctrines to dismiss lawsuits *in limine litis*. The Special Rapporteur encourages States to provide civil remedies and rehabilitation for victims of foreign acts of torture or other ill-treatment and to ensure in their legal system that victims obtain redress regardless of who bears responsibility for mistreatment or where it took place.**

73. **International human rights norms prohibiting torture and ill-treatment and mandating their prevention are applicable even in wartime and operate concurrently and complementarily with applicable laws of war norms. The Special Rapporteur calls upon States to implement international humanitarian law obligations that are more protective than those under the Convention against Torture, such as the "overall control" test and the broadened definition of torture that omits the public official requirement.**